

# Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises

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## I. INTRODUCTION

Should promises made by consumers to merchants be enforced?<sup>1</sup> This question has prompted a massive amount of debate. Virtually everyone acknowledges that a problem exists. Consumers are far too often making unwise purchases: either by paying more than a product is worth or by purchasing a product not well suited to their needs. No long term proposal to solve this problem has gained sufficient support to become a realistic possibility. The proposals that have been made focus on one of two aspects of the consumer/merchant relationship: (1) whether there was a reasonable opportunity for effective bargaining between the merchant and the consumer,<sup>2</sup> and (2) whether the market was reasonably competitive.<sup>3</sup> The particular solution proposed has depended upon which of these two aspects the writer has regarded as the primary source of the problem.<sup>4</sup>

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1. In asking whether consumer promises should be enforced, the specific question is whether expectancy damages—that is, awarding the merchant the benefit of his bargain—should be granted. The principal problem in merchant/consumer transactions is the unfairness of the bargain. When expectancy damages are not awarded, this problem largely disappears. As a consequence, unless otherwise indicated, “enforcing” a promise should be taken to mean protecting the merchant’s expectancy interest. See Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742–48 (1982); Atiyah, Book Review, 95 HARV. L. REV. 509 (1981) (reviewing C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981)).

2. See generally Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294–95 (1975) (dealing primarily with unconscionability although discussing the need for courts to police the process of contracting, i.e., bargaining); Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 3 (1981) (dealing primarily with unconscionability although discussing the need to examine the consumer law categories of bargaining misconduct); Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 498 (1967) (dealing primarily with U.C.C. § 2-302 on unconscionability although examining the procedural history of the section in terms of the relevance of bargaining misconduct).

3. See generally Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1183 (1976) (arguing that to cure inefficiencies and inequities of high prices and oppressive contractual clauses present in today’s imperfect markets requires legislative intervention to mandate minimal contractual provisions and to lower the costs of price searches); Cf. Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 631 (1979) (arguing that objections to enforcing contracts made by imperfectly informed consumers are unjustified when those contracts concern goods exchanged in competitive markets).

4. This is not intended to mean that the wealth of legal scholarship can be divided into these two categories. Some articles do not fall into either category. This is especially true of Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970) which contains some of the same observations and proposals expanded upon in this Article. Several other articles combine an examination of the opportunity for effective bargaining with an analysis of the consumer market economy. Among the more noteworthy of these articles are Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1981); Eisenberg, *supra* note 1; Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); and Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

Most courts and many commentators have directed their attention to whether there was a defect in the bargaining process.<sup>5</sup> When the merchant knowingly took advantage of an infirmity in the bargaining process resulting in a substantively unfair contract, courts and commentators usually relieve the consumer from the burden of his promise. In determining whether a bargaining defect existed, courts have inquired as to whether the consumer lacked a "meaningful choice";<sup>6</sup> did the seller engage in any sharp practices;<sup>7</sup> were important terms written in fine print;<sup>8</sup> did the consumer suffer from a readily apparent mental or physical disability;<sup>9</sup> was the consumer unable to speak or read English;<sup>10</sup> or, did the consumer lack adequate bargaining power?<sup>11</sup> But despite numerous attempts, no one has been able to adequately delineate the extent to which these factors must be present in order to excuse the consumer from his promise. Some courts find substantive unfairness alone sufficient to permit relief, reasoning that the bargain would not have been so uneven unless there was also a defect in the bargaining process.<sup>12</sup> Once the determination is made that the contract was procedurally flawed, the contract is rewritten by the court in an attempt to achieve substantive fairness.

Many current commentators, some of whom acknowledge that the opportunity for effective bargaining by individual consumers seldom exists, find the relevant issue to be whether the market itself is reasonably competitive.<sup>13</sup> In such a market, they argue, merchants are forced to offer reasonable prices and terms, thereby ensuring a fair transaction whether or not any particular consumer has engaged in bargaining or shopping. As long as sufficient consumers are knowledgeable about the product and are willing to shop for a good bargain, the interests of uninformed consumers are protected. These commentators seldom believe that substantive regulation is a necessary or even viable means of consumer protection. When a market is acting noncompetitively, they opt instead for efforts to make the market more competitive.

Notwithstanding their apparent differences, one basic assumption underlies both of these approaches: a substantial percentage of consumers can make rational choices as to which products to purchase and at what prices.<sup>14</sup> If this assumption is incorrect, none of their proposed solutions will be sufficient to alleviate the problem. It is the thesis of this Article that the adeptness of salesmanship and advertising combined

5. See *supra* note 2 and *infra* notes 6–12.

6. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); See generally E. FARNSWORTH, *CONTRACTS* §§ 4.28 at 314–16 (1982) (factors relevant to unconscionability).

7. E. FARNSWORTH, *supra* note 6, at 315; see *Leasing Serv. Corp. v. Broetie*, 545 F. Supp. 362 (S.D.N.Y. 1982); *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (Sup. Ct. 1973).

8. See *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569 (D. Kan. 1986); *Frank's Maintenance & Eng'g, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 991, 408 N.E.2d 403, 411 (1980) (commercial setting).

9. See E. FARNSWORTH, *supra* note 6, at 315.

10. See *Brooklyn Union Gas Co. v. Jimenez*, 82 Misc. 2d 948, 371 N.Y.S.2d 289 (N.Y. Civ. Ct. 1975); *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y. Civ. Ct. 1969).

11. See *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969).

12. See *Kugler v. Romain*, 58 N.J. 522, 530, 279 A.2d 640, 653 (1971); *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc. 2d 1, 13, 380 N.Y.S.2d 532, 543 (N.Y. Sup. Ct. 1976); See also *Gordley*, *supra* note 4, at 1650.

13. See *supra* note 3.

14. But see *Speidel*, *supra* note 4, who does not make this assumption.

with the limited information and analytical skills possessed by a vast majority of the consuming public causes most consumer purchases to be irrational. Present legal principles, which, for the most part, enforce consumer promises, help create an inefficient market, thereby causing an irrational use of our resources. Moreover, considering the state of the current consumer market, there are no sound economic or moral reasons for enforcing consumer promises. To remedy these problems, a completely new set of legal rules and institutions is needed.

This Article will examine the inherent defects in our consumer market economy which result in a majority of consumers making irrational purchases. It will then examine what consequences these defects should have for the enforceability of consumer promises. The Article will conclude by suggesting a number of possible changes in our legal rules and institutions which could alleviate these problems.

## II. INHERENT DEFECTS IN THE BARGAINING PROCESS

Advertising and salesmanship are geared not toward educating consumers but rather toward depriving them of the ability to make rational choices. Our economic system, as well as our legal rules, operates to encourage, rather than discourage, businesses to concentrate more on how to sell a product than on how to make a better product. In their attempt to direct consumers' attentions away from the shortcomings of their products, American businesses probably spend more money on advertising, packaging, and salesmanship than on research and development. The effectiveness of this advertising and salesmanship coupled with the complexity of present-day life undercuts the benefits thought achieved by leaving our consumer economy free from substantial governmental interference.<sup>15</sup>

For a buyer to make a rational purchase decision, he must possess the information necessary to make this choice as well as the ability to utilize this information.<sup>16</sup> The term "rational purchase" shall be used to mean a purchase that would have been made if the purchaser had all relevant information and the evaluative ability to make a decision that would maximize his own utility. To the extent that either the information or the evaluative ability is absent, whether a purchase maximizes a buyer's utility is mere happenstance. Without both, a purchaser can only guess at what product to buy and the price to pay for it. In most consumer transactions, either adequate information or the ability to use it, or both are missing. As a result, few consumer purchases are rational.

Since most consumer transactions do not involve bargaining, the prices charged for most products are not determined by the conduct of any individual consumer.<sup>17</sup> Whether a particular purchaser has in fact engaged in bargaining or shopping is relevant only when the price is individually negotiated. In most consumer transac-

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15. See Birmingham, *The Consumer as King: The Economics of Precarious Sovereignty*, 20 CASE W. L. REV. 354, 356 (1969).

16. See Gordley, *supra* note 4, at 1611; Atiyah, *supra* note 1, at 514; Easterbrook & Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 673-77 (1984); Hillman, *supra* note 2, at 25-26.

17. See Comment, *supra* note 3, at 1179; Schwartz & Wilde, *supra* note 3, at 631, 638, 655; Slawson, *supra* note 4, at 548; Easterbrook & Fischel, *supra* note 16, at 694.

tions, the store sells to all purchasers at the same price and on the same contract terms ("fixed price" products). In these transactions, whether the price or other contract terms are competitive is determined by whether sufficient consumers possess adequate information and evaluative ability to cause a competitive price.<sup>18</sup> As to products with no "fixed price," *i.e.*, when the price or terms are individually bargained, the presence of a competitive price must be evaluated not only in terms of the individual consumer, but also in terms of other purchasers in general since the consuming public will be instrumental in establishing the price range within which the merchant will be able to charge the individual consumer.

A more in-depth analysis of the problems consumers face in bargaining and shopping sheds light on why there is not enough true competition to cause competitive prices or the sale of higher quality products at reasonable prices.

### A. Information

A consumer can neither know what product to buy nor what price to pay for it unless he has certain information.<sup>19</sup> To be completely informed, he would have to know the prices charged by all sellers ("comparable prices"),<sup>20</sup> the availability of alternative substitute products ("reasonable substitutes"),<sup>21</sup> the quality of the product, and the manufacturing cost or wholesale price. In addition, the consumer must have the ability to rationally judge his desire or need for the product.<sup>22</sup> To whatever extent a consumer lacks any of this information, his purchase decision must be based upon certain assumptions as to what this information would disclose. How nearly these assumptions reflect reality will determine how closely the price he offers corresponds to his actual valuation of the product and whether he truly prefers this product over others. As to fixed priced products, the greater the extent to which the public possesses full information, the greater the likelihood that a product's price and market share would correspond to what a knowledgeable individual would be willing to pay if he had full information and if bargaining were allowed.

Certain economic analysis models suggest that a market based upon imperfect information may not be as efficient as one based upon full information.<sup>23</sup> But absent legal compulsion, the market itself provides little incentive to merchants to disclose

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18. See Comment, *supra* note 3, at 1179.

19. See generally Hillman, *supra* note 2, at 26 (dealing primarily with unconscionability although discussing the inability of consumers to make rational decisions concerning their purchases based on the unavailability of the necessary market information at a reasonable cost); Landers & Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 713 (1979) (describing the basic premise of the Truth in Lending Act that consumers needed certain information as part of the contracting process); Russo, *More Information is Better: Reevaluation of Jacoby, Speller and Kohn*, J. CONSUMER RES., Dec. 1974 at 68; Schwartz & Wilde, *supra* note 3, at 632-34 (describing the conventional understanding that legal intervention is justified by the existence of imperfect information since consumers cannot contract in their own best interests without the data to rank the purchase choices that markets offer, although arguing that legal intervention is unnecessary). Cf. Birmingham, *supra* note 15, at 357.

20. See Gordley, *supra* note 4, at 1617-18; See generally Birmingham, *supra* note 15, at 357 (discussing Pareto optimality factor whereby all markets must be linked by perfect knowledge of the characteristics of products). The availability of "comparable prices" may be limited by a buyer's ignorance or by the geographic inaccessibility of other businesses. See Leff, *supra* note 2, at 553.

21. See Schwartz & Wilde, *supra* note 3, at 633 n.8.

22. *Id.*

23. See generally Schwartz & Wilde, *supra* note 3, at 631.

complete information.<sup>24</sup> Likewise, there is little legal compulsion to provide comprehensive information. Disclosure is required for only some types of consumer transactions.<sup>25</sup> Even when information is actually provided, advertisers and salesmen<sup>26</sup> are permitted, because of the ineffectiveness of present legal remedies, to present facts in a way intended to mislead the public.<sup>27</sup> Failing to disclose relevant facts thus results in the consumer obtaining a distorted picture of the product, but seldom subjects the seller to liability for misrepresentation.<sup>28</sup>

### 1. Comparable Prices

A consumer must know the price each seller in the market charges in order to know which seller is offering the best price. Discovering comparable price information is often difficult and costly.<sup>29</sup> A consumer must expend substantial time and energy "shopping around." The extent to which he shops depends upon a combination of factors including the extent and likelihood of potential savings, search time required, and knowledge of the various options.<sup>30</sup> Few consumers have sufficient information as to any of these factors to engage in rational shopping behavior. Many consumers just assume that the price differential between stores is not great enough to justify shopping around.<sup>31</sup> Often this assumption is wrong.<sup>32</sup> When a sufficient percentage of the public does not shop around, a store may find it advantageous to charge excessive prices, thereby making up in a higher profit margin what it loses in volume of sales. The failure to shop around may therefore result in a consumer paying a far higher premium than he would have been willing to pay for this convenience had he known of the extent of the price disparity.

Advertising can be fairly effective at informing consumers of comparable prices.<sup>33</sup> To the extent that prices are advertised, comparison shopping is made easier. Unfortunately, there is sufficient price advertising for only a small percentage of products. As to other products, consumers can sometimes learn which stores generally have lower prices.<sup>34</sup> But even when a store has acquired a reputation for lower prices, the store often sells only some products at these lower prices. After

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24. See R. Pitofsky, *Advertising Regulation and the Consumer Movement*, in *ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION*, 27, 29, 30 (D. Tuerck ed. 1978).

25. The Truth in Lending Act, 15 U.S.C. §§ 1602-1607, 1610, 1612-1614, 1631-1632, 1635, 1637-1638, 1640-1641, 1663-1664, 1665a, 1666, 1666d, 1667d, 1691f (1980), is probably the most well known of the disclosure statutes. Among the many others include the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a note, 57b, 57c, 2301-2312 (1982); Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1703, 1708, 1709, 1711, 1715, 1717, 1719a, 1720 (1982); and CAL. CIV. CODE §§ 1102, 1102.1, 1102.2, 1102.4-1102.14 (West Supp. 1987) (disclosures upon transfer of real property).

26. Throughout this Article "salesmen" refers to both male and female salespersons.

27. See generally Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1 (1974).

28. *Id.*

29. See Schwartz & Wilde, *supra* note 3, at 643-45.

30. See generally Landers & Rohner, *supra* note 19, at 718 (dealing with Truth in Lending Act although stating that shopping for credit is rational only if the marginal cost of shopping exceeds the marginal return from shopping).

31. *Id.*

32. *Id.*

33. See Schwartz & Wilde, *supra* note 3, at 645.

34. See Rakoff, *supra* note 4, at 1226-27; Brandt & Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J.L. REF. 297, 311 (1974).

luring the consumer into the store with loss leaders and advertised specials the consumer will often purchase other products without comparing prices. He makes the assumption that all of the store's prices, if not the lowest in town, are at least competitive. This assumption is not always correct.

A consumer may learn from experience that a particular store charges higher prices. But unless he has the time and means to check other stores, he may not learn the magnitude of the overcharge. He may continue to patronize that store as long as he is unaware of the extent of the overcharging. Since prices on fixed price goods are determined by what the market is willing to pay, it may be argued that shopping by informed consumers protects uninformed consumers.<sup>35</sup> This is true, however, only if there is enough shopping by informed consumers to affect prices. It is the thesis of this Article that most consumers are neither rational nor value maximizing. As a result, knowledgeable consumers will not be able to make a substantial dent in prices. They will simply be able to find for themselves whatever bargains exist and successfully bargain where allowed.

When prices are set through individual negotiations there are added difficulties in discovering the lowest price available. Salesmen are far more adept at negotiating than are consumers. Before being able to compare prices, the consumer must be able to determine the lowest price each seller is willing to charge him. Yet discovering this price may be difficult and time consuming. The buyer must know how to elicit a good price from the salesman. If a consumer is experienced at negotiating, he may get a good price. If he is not, he will be no match for the salesman. To compare prices, the buyer must go through this process with each dealer. Salesmen develop techniques for preventing a buyer from using one dealer's prices to elicit lower prices from other dealers. Many car dealers will refuse to quote a price. Instead they require the buyer to submit a written offer. Comparison shopping is thus virtually impossible since once the offer is accepted, the buyer is bound to purchase from that dealer. Even when this technique is not employed, a salesman may make the price offered available only during the consumer's visit.

## 2. Cost Information

It would be very helpful for a consumer to know the wholesale price or manufacturing cost of a product. He would then have a better idea of whether he should shop further or even delay his purchase. Such information also would be an indication of the reasonableness of the price, the product's quality, and the wisdom of purchasing the particular product or finding an alternative product.

If the profit margin evidenced by the difference between the retail price, on the one hand, and the wholesale price or manufacturing cost, on the other hand, is reasonable, there is a strong chance that the product will not be sold for substantially less elsewhere. Without this information, a consumer has a harder time estimating the potential price disparity between stores. Likewise, when a new product comes on the market, the price often will be artificially high. If cost information were available, a

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35. See Schwartz & Wilde, *supra* note 3, at 638-39.

consumer would be in a better position to know whether he should wait and see if the price will go down. When there is a large profit margin, there is a good chance that retailers would find, after the initial excitement for the product has waned, that net profits can be maximized by lowering prices so as to increase sales volume. When there is a small margin of profit, the retailer may instead discontinue selling the item.

Disclosure of this information would have the effect of stabilizing the prices of any product whose cost is substantially lower than its list price. Many consumer products, *e.g.*, clothes, furniture, or appliances, fall into this category. Retail price disparities of 100% or more as to these products often can be found among different stores. Mandating disclosure of this information would probably be met with cries of trade secret infringement,<sup>36</sup> and impingement of the seller's right to obtain the highest possible price for his property. Yet there is no reason to allow a seller to obtain an artificially high price simply because of the buyer's ignorance of the product's cost or wholesale price.

### 3. *Product Quality*

Determining the quality of each product, judging its respective advantages and disadvantages, and choosing which product best suits his needs are probably the most difficult informational problems facing a consumer.<sup>37</sup> Some quality traits can be measured objectively. When the product possesses such traits, it may be easier to choose the better product. A consumer must simply acquire the relevant data. For instance, in the case of medicines or vitamins, effectiveness will depend upon each product's ingredients. Theoretically, one could objectively compare different brands of vitamins. Yet to obtain a competitive advantage, the manufacturer has an incentive to add ingredients solely to create the appearance of product differentiation. To the extent that the manufacturer can add some ingredient whose value cannot be objectively measured, he will give his advertising agency something to sell.

Even when products are identical, advertising of a brand name product can make the consumer erroneously believe that the generic brand is inferior. He may acquire the erroneous impression that the brand name product contains superior ingredients. A consumer's experience may not be sufficient to dispel this mistaken belief. Even when the generic brand product is effective the consumer cannot be sure, without purchasing it, that the brand name product would not have been more effective.

When a product is complex, like a car or a computer, other problems exist. First, it is necessary to assign a monetary value to the advantages and disadvantages of each product. For instance, in deciding whether to purchase a computer having a hard disk and a floppy disk or one with two floppy disks, the consumer must determine the importance of having the added capacity of the hard disk. Although he may know the differences in capacities, he has no means of determining whether the added capacity

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36. Courts vary as to whether mandatory disclosure of cost information would run afoul of trade secret protection. R. M. MILGRIM, *MILGRIM ON TRADE SECRETS* §§ 2.09[8], 2-218 to 2-221 (1987).

37. See Comment, *supra* note 3, at 1177.

of the hard disk is worth the extra cost. Secondly, there are many traits which cannot be objectively measured. For instance, the smoothness of a car's ride is purely subjective. Even its durability seldom can be determined accurately, although repair records may be helpful. Thirdly, even identical products can be differentiated by sale upon different terms.<sup>38</sup> When one dealer gives a one-year warranty while another dealer gives a five-year warranty, a consumer must place a monetary value on this difference in warranties. Comparison shopping no longer becomes a matter of obtaining price quotations: the consumer must now determine the probability of the product needing repairs and the estimated cost of those repairs. Salesmen and advertisers often prey on consumer fears in their attempt to alter the consumer's valuation of a product. For instance, one notable case involved a tire advertisement which read "If it only saves your life once, it's a bargain."<sup>39</sup> This type of advertisement works to impair the consumer's ability to make an objective choice.

There are some products whose quality is not subject to any objective measurement, *e.g.*, diet or weight loss pills, face creams, or hair replacement preparations. Salesmen try to convince consumers to buy these products by exploiting their insecurities. Consumers must decide whether taking a chance at losing weight or putting on hair is worth the price of the product. Having no reliable information as to the product's true chance of success, consumers may be led to pay an unreasonable price.

It can be argued that the market has its own mechanisms for encouraging the sale of better products. For instance, consumers can learn from experience that a product is inferior or overpriced; but this does not always happen. Infrequently purchased goods, such as cars, computers, television sets, or refrigerators, give a consumer little chance to learn from his own experience.<sup>40</sup> He may not purchase the same product again, but there is no assurance that his next purchase will be any wiser. With frequently purchased goods, such as toilet paper or milk, a consumer can learn more from his own experience.<sup>41</sup> But consumers may not know that another product may be better. Until he uses the other product, he cannot compare the two. Many consumers would rather stay with a marginally adequate product than take a chance on a product that may prove to be inadequate. As Shakespeare wrote, we "rather bear those ills we have [t]han fly to others that we know not of."<sup>42</sup> When a product is satisfactorily serving its purpose, a consumer will have little occasion to try another product even though the latter may be better. When a consumer is reasonably satisfied with a product, the advertising campaign of another product has to be quite good to convince him to give that product a try. As a consequence, the leading products often will be the ones whose advertising has successfully achieved strong name recognition and which satisfactorily perform their task at a reasonable price. Yet there may be better and lower priced products which most people never try.

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38. *See id.* at 1168.

39. *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 262, 315 A.2d 16, 18 (1974).

40. *See* R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.7 at 83 (2d ed. 1977); Schwartz & Wilde, *supra* note 3, at 658-59, 662.

41. *See* Schwartz & Wilde, *supra* note 3, at 662; Comment, *supra* note 3, at 1175-76.

42. W. SHAKESPEARE, *HAMLET, PRINCE OF DENMARK*, Act III, Scene 1, lines 81-82.



Neither a product's reputation nor a consumer's friends are necessarily good sources of information. The general reputation of a product is, for the most part, a result of advertising. Since purchasers may not have tried other products, loyalty to a product whose reputation was acquired by advertising may outlive consumer dissatisfaction. For all these purchasers know, no other product may work any better. Even when many consumers are dissatisfied, there may be a substantial lag time between general dissatisfaction and a corresponding change in the product's reputation. Seldom does a consumer obtain reliable product information from friends or relatives.<sup>43</sup> Even when they do, not only must the consumer be able to trust their judgment, but those fellow consumers must, in fact, have good judgment.

Publications such as *Consumer Reports* do not provide an adequate source of information about most products.<sup>44</sup> It is unlikely that the consumer will be able to obtain, at the time of purchase, a copy of the particular issue that covers the specific product in question. A good shopper may plan far enough ahead to investigate such sources, but the vast majority of consumers do not. In addition, the consumer's reliance on a publication must depend upon his faith in the opinion of a publication about which he may know little. Although some consumer publications may in fact be completely impartial,<sup>45</sup> it is not clear the extent to which many of the magazines that review consumer products are indeed impartial. It is difficult to produce consumer research at a price sufficient to cover the cost of doing the research.<sup>46</sup> Once the information is dispensed to the public, consumers who do not purchase the magazine can acquire the information cost-free.<sup>47</sup> Many consumers may not subscribe to the magazine on the belief that, when needed, they can find the relevant issue of the publication in the library. Therefore, they decline to purchase a subscription to the magazine. As a result, many publications may take advertisements from or otherwise be supported by the manufacturers whose products are being evaluated.<sup>48</sup>

The existence of competition may not aid in giving the consumer necessary purchase information since the information may be slanted.<sup>49</sup> A salesman's ability to convince a consumer of the desirability of a product may have more to do with his style than with the truth of his statements. Thus, the consumer may have no grounds for believing the assertions of one salesman over those of another. His only basis may be the intuitive belief that one or the other is more trustworthy. This intuition is often wrong.

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43. For example, one consumer study revealed that 12% of the survey respondents discussed credit terms with friends or relatives prior to a credit purchase. See Brandt & Day, *supra* note 34 at 311.

44. The number of publications that review consumer products is fairly extensive. Among these are AUDIO; BUSINESS SOFTWARE; COMPUTER EQUIPMENT REVIEW; CONSUMER DIGEST; CONSUMER'S RESEARCH; INFOWORLD; and MOTOR TREND. For a contrasting opinion as to the effectiveness of these publications, see Schwartz & Wilde, *supra* note 3, at 666.

45. CONSUMER REPORTS, for instance, refuses to take any advertisements or other support from commercial interests.

46. R. POSNER, *supra* note 40, § 4.7 at 81-82.

47. See *id.* at 84; Easterbrook & Fischel, *supra* note 16, at 694.

48. CAR AND DRIVER, for instance, does take advertisements from products reviewed.

49. See R. POSNER, *supra* note 40, § 4.7 at 81-82.

#### 4. Reasonable Substitutes

It is difficult for consumers to discover the reasonable substitutes for a product. The consumer must first determine which products can perform the required tasks and then must make a decision as to which of these products best suit his needs. Whether a consumer has the ability and incentive to discover reasonable substitutes involves problems similar to those confronted by the consumer in price shopping or determining product quality. The general means for discovering reasonable substitutes are shopping around, advertising, and publications like *Consumer Reports*. As noted, although magazines like *Consumer Reports* may provide some help, they have not been the complete answer.<sup>50</sup>

Advertising and salesmen may also inform consumers of one product's ability to substitute for another, but neither is adequate to enable consumers to properly evaluate the alternatives. Advertisements seldom provide sufficient detail to allow adequate comparisons to be made. Furthermore, because of the ineffectiveness of legal sanctions for failure to disclose relevant information,<sup>51</sup> consumers cannot rely upon the information obtained from advertising. Salesmen are trained to dissuade consumers from seeking alternatives, as well as to convince them to choose the particular product promoted by the salesman. Salesmen are wrongly perceived as experts by many consumers. As a result, many consumers follow a salesman's recommendation without shopping around.<sup>52</sup> Even when the consumer shops around, often he will be talking to other salesmen. He will have little objective basis for believing one salesman's pitch over another's. Each will be convincing as to why his product is better. The consumer ultimately will have to base his decision on which salesman is more convincing. The salesman's style and manner often will be determinative. When a store sells more than one brand of a product, there may be an incentive for the salesman to sell a particular brand. Even when the salesman has no such incentive, he may be poorly equipped to advise consumers about the merits of each alternative. As a result, whether a consumer purchases one product or another may bear little relationship to the product's relative suitability.

#### 5. Need or Desire for the Product

Advertising and salesmanship to a large extent determine what consumers want and what they think they need.<sup>53</sup> Some of these artificially created desires become an integral part of our culture. These desires may remain strong for years. Others may be just passing fads. Marketing strategies play upon fantasies in order to sell products. Instead of emphasizing a product's quality or price, the illusion is created that the product will endow the consumer with some highly praised attribute—sexuality, popularity, youth, or slimness. Purchase of the product may have nothing

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50. See *supra* notes 44–48 and accompanying text.

51. See *supra* note 27.

52. Eisenberg, *supra* note 1, at 780–81.

53. The proposition that an individual, as “the best judge of his own interests,” makes his own decision is controverted by human experience. See Atiyah, *supra* note 1, at 527; See generally H. MARCUSE, ONE DIMENSIONAL MAN (1964) (arguing that there is no “free choice” among goods and services).

to do with the acquisition of these traits. The advertiser or salesman usually knows this. But nothing prevents him from implying that they do. Sometimes the consumer's discovery of the truth occurs promptly upon the use of the product. With other products, discovery may take a substantial period of time as well as a large financial investment. Thus, a consumer may realize only after his purchase that he does not want or need the product; he has made an irrational purchase.

### *B. Ability to Bargain, Shop, and Evaluate*

Even assuming complete availability of relevant product information, consumers need to have certain skills and abilities in order to use that information to make a rational purchase. Some consumers lack these skills and abilities.<sup>54</sup> Because of this widespread lack of evaluative ability, the price of even fixed price products does not necessarily represent the true value the consuming public places on the product.

There are many different abilities a consumer must have in order properly to evaluate the desirability of a product.<sup>55</sup> He first must have the ability to determine what information is necessary in order to make his evaluation. This requires that he possess not only an analytical mind but also confidence in his own judgment.

After learning the right questions to ask, a consumer must know how to seek out the answers. Consumers differ greatly in their knowledge of relevant sources of information. When the consumer does not believe that the information is readily available, he must decide whether to search for it. To make this determination, he must have the ability to estimate the importance of the information along with the time it will take to acquire it.

After the information is acquired, the consumer must have the ability to understand and weigh the information.<sup>56</sup> He must not only understand the information but he must be able to place objective values on the advantages and disadvantages of each product. Considering the complexity and number of different products, most consumers have the ability to evaluate information about only a few of these products. Advertisers and salesmen attempt to divert a consumer's attention away from relevant criteria to the particular qualities his product possesses. A good salesman excels at such diversion. Even when competitors point out a product's shortcomings, a good salesman can often convince a buyer that the disadvantages are of little consequence.

Because of these difficulties, the price and market share of a product often depend more on how well the advertiser or salesman can convince the public that

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54. Arguments that justify the enforceability of consumer contracts on the grounds that the consumer's purchase decision is the result of careful analysis and deliberation lack support in reality. See P.S. ATIYAH, *PROMISES, MORALS, AND LAWS*, 131, 172 (1981); Hillman, *supra* note 2, at 26; Speidel, *supra* note 4, at 363, 364; Comment, *supra* note 3, at 1169; See also Brandt & Day, *supra* note 34, at 300, 312 (relationship between consumer understanding of credit rates and terms and consumer purchases); Atiyah, *supra* note 1, at 515, 517.

55. For example, an investor attempting to make sense of the typical "readable" prospectus must be able to sift out the required information from the bulk of technical and legal jargon. See Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 *HASTINGS L.J.* 311, 351 (1974).

56. See Comment, *supra* note 3, at 1182; Landers & Rohner, *supra* note 19, at 726; Schwartz & Wilde, *supra* note 3, at 636.

certain factors are crucial rather than upon the actual superiority of the product. To accomplish this they will often use whatever psychological methods they can devise. The competition can do the same, but this simply results in a sale by the competitor who is best at playing the game rather than a sale by the competitor who makes the superior product.

When the transaction is individually bargained, the consumer also needs to know how to negotiate, which requires that he be able to withstand different types of psychological pressures. Since salesmen are experts at these techniques, even a skeptical consumer has a difficult time making a wise purchase. On many occasions, consumers do not bargain because they do not know that bargaining is permitted.<sup>57</sup> A consumer may erroneously believe that an employee has no authority to change the price or terms,<sup>58</sup> or the consumer simply may be too embarrassed or too shy to ask.

Sellers take advantage of the fact that most consumers lack these abilities. When the behavior of a seller is especially egregious, courts have utilized the doctrine of unconscionability to protect the consumer. The classic elements of procedural unconscionability—*e.g.*, lengthy contracts with fine print,<sup>59</sup> incomplete or complicated price quotations, high pressure tactics by salesmen,<sup>60</sup> or taking advantage of consumers not fluent in English<sup>61</sup>—are simply extreme examples of the typical sales techniques and common bargaining or shopping impediments that have been discussed in this section. In this sense, most consumer transactions are procedurally unconscionable.

### III. MORAL AND ECONOMIC GROUNDS FOR ENFORCING CONSUMER PROMISES

Two types of justifications are generally offered for enforcing consumer promises. First, consumers, like other promisors, are morally obligated to keep their promises. Second, economic efficiency requires enforcement of consumer promises.

#### A. Moral Obligation to Perform Promises

##### 1. Basic Moral Theories Supporting Enforcement of Promises

There are two prominent theories supporting the proposition that consumers are morally obligated to keep their promises: libertarianism and utilitarianism.<sup>62</sup>

The most vocal advocate of the libertarian position is Charles Fried.<sup>63</sup> He

57. See Rakoff, *supra* note 4, at 1225.

58. *Id.*

59. See *supra* note 8.

60. See *supra* note 7.

61. See *supra* note 10.

62. See Epstein, *supra* note 2, at 293. A hybrid view has sometimes been espoused under which a person has a moral obligation to refrain from injuring others through his negligent or intentional acts. Under this view, a consumer would have a moral obligation to reimburse a merchant for his reliance losses but not for his expectancy losses. The origin of his moral obligation is not the promise but the harm caused by the promise. See P.S. ATIVAH, *supra* note 54, at 140-43; Eisenberg, *supra* note 1, at 785, n.121. Some have argued, though, that in order to ensure that the merchant's reliance interest is protected, it is necessary to award him expectancy damages. See Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 60 (1936). See also Eisenberg, *supra* note 1, at 785-87.

63. See C. FRIED, *CONTRACT AS PROMISE* (1981).

summarizes his version of libertarianism in this excerpt from *Contract as Promise*:<sup>64</sup>

The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust. . . . An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite.<sup>65</sup>

Fried's theory is based upon a well entrenched liberal theory of justice together with a Kantian view of the primacy of mutual respect:

It is a first principle of liberal political morality that we be secure in what is ours—so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world. . . . But whatever we accomplish and however that accomplishment is judged, morality requires that we respect the person and property of others, leaving them free to make their lives as we are left free to make ours. This is the liberal ideal.<sup>66</sup>

Two distinct premises underlie Fried's theory. The first is that promising is an act by which the promisor intentionally invites the confidence of the promisee.<sup>67</sup> By this act of free will, the promisor chooses to impose upon himself the moral obligation to keep his promise.<sup>68</sup> It is essential that he be allowed to do so, for, according to Fried, the ability to form true and rational judgments and to act on them is the heart of respect as a moral being.<sup>69</sup> By not taking a promise seriously, we show disrespect for the promisor:

[H]olding people to their obligations is a way of taking them seriously . . . . I would say that respect for others as free and rational [beings] requires taking seriously their capacity to determine their own values. . . . Others must respect our capacity as free and rational persons to choose our own good, and that respect means allowing persons to take responsibility for the good they choose.<sup>70</sup>

The moral enforceability of a promise depends upon the freedom with which it is made.<sup>71</sup> When a promise is not made freely and intentionally, the promisor has not by his act of promising undertaken a moral obligation to perform it.

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64. C. FRIED, *supra* note 63. A summary of the basic libertarian view can be found in Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980):

The libertarian theory of contract law is premised upon the belief that individuals have a moral right to make whatever voluntary agreements they wish for the exchange of their property, so long as the rights of third persons are not violated as a result. For a libertarian, there are only two grounds on which an exchange may be impeached: first, that it infringes on the rights of someone not a party to the agreement, and second, that one of the individuals agreeing to the exchange was coerced into doing so, and thus did not give his agreement voluntarily.

*Id.* at 475–76.

65. C. FRIED, *supra* note 63, at 16.

66. *Id.* at 7.

67. *See id.* at 16.

68. *See* Atiyah, *supra* note 1, at 509.

69. C. FRIED, *supra* note 63, at 78.

70. *Id.* at 20.

71. *See id.* at 35. *See also* Kronman, *A New Champion for the Will Theory* (Book Review), 91 YALE L.J. 404, 414 (1981) (reviewing C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981)) [hereinafter Kronman, Book Review]. For the general libertarian requirement that the agreement will be voluntary see Kronman, *supra* note 64, at 478.

The second premise underlying Fried's theory is the Kantian principle of mutual trust and respect.<sup>72</sup> The promisee is led to expect the promised performance and the promisor abuses this confidence when he fails to perform. Fried sees promising

as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise . . . . There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.<sup>73</sup>

By invoking the convention of promising, a mutual trust and respect is established between the promisor and promisee. By breaking his promise, the promisor abuses this mutual trust and fails to respect the promisee as a moral being.<sup>74</sup> When the promisee has procured the promise by immoral means, having betrayed the trust himself, he has no right to expect performance by the promisor.<sup>75</sup> Yet Fried, like other libertarians,<sup>76</sup> narrowly defines immorality, believing that individuals should be free to press their individual advantages to legally permissible limits.<sup>77</sup> Fried sees the liar as not entitled to enjoy the advantages obtained through his deceit.<sup>78</sup> But he finds the promisee to have no duty to disclose information<sup>79</sup>—believing that there is no moral compulsion to share one's lawfully acquired advantages. Although altruism may be a virtue, imposing altruism as a legal or moral requirement would amount to tyranny.<sup>80</sup>

Fried's theory is a modern and less rigid version of the will theory of contracts.<sup>81</sup> During the 19th century and the first half of the 20th century, contract law was dominated by the will theory.<sup>82</sup> To refuse to enforce a bargain was viewed as a deprivation of the individual's right to exercise his free will.<sup>83</sup> The will theory has been primarily responsible for shaping present-day contract law.<sup>84</sup> It underlies the law's reluctance to relieve a consumer from disadvantageous promises except under circumstances indicating that he was not exercising his free will. Thus, historically, consumer promises were enforced except when a defense such as incapacity, duress, fraud, or mistake could be established.<sup>85</sup> Today, the doctrine of unconscionability and the limited enforcement of contracts of adhesion allow relief only when there is an "absence of a meaningful choice."<sup>86</sup>

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72. See C. FRIED, *supra* note 63, at 17.

73. See *id.*

74. See *id.*; but cf. Kronman, Book Review, *supra* note 71, at 412.

75. See C. FRIED, *supra* note 63, at 76, 83, 84; Atiyah, *supra* note 1, at 513.

76. See Epstein, *supra* note 2, at 299.

77. See C. FRIED, *supra* note 63, at 83; but cf. Kronman, Book Review, *supra* note 71, at 406.

78. See C. FRIED, *supra* note 63, at 76, 84, 85; Atiyah *supra* note 1, at 513.

79. See C. FRIED, *supra* note 63, at 82-84; Epstein, *supra* note 2, at 299.

80. See C. FRIED, *supra* note 63, at 91. See also Epstein, *supra* note 2, at 299.

81. See Atiyah, *supra* note 1, at 523.

82. See P.S. АТИЯН, *supra* note 54, at 13-19.

83. *Id.* at 15-16.

84. *Id.* at 22-24.

85. *Id.* at 7.

86. See *supra* notes 6-11 and accompanying text.

The second theory used to justify enforcing consumer promises is utilitarianism.<sup>87</sup> Two utilitarian arguments support enforcement of consumer promises. First, a promisor has a moral obligation to keep his promise because the utility levels, *i.e.*, pleasure or happiness, of all promisors and promisees are greater under a rule that enforces consumer promises than under a rule which does not.<sup>88</sup> Second, enforcing promises encourages human cooperation by creating trust between the promisor and promisee.<sup>89</sup> By encouraging human cooperation, the combined level of happiness or pleasure of all persons is maximized. Both of these arguments assume that promisors know, before making their promises, what would give them the most pleasure or happiness. As a result, enforcing their promises maximizes their happiness and pleasure.

Neither libertarianism nor utilitarianism justifies the enforcement of consumer promises. Libertarianism fails because neither of its premises holds true in the case of consumer promises. Utilitarianism is, on the other hand, basically the same theory as economic efficiency except that utility, *i.e.*, happiness or pleasure, is substituted for human satisfaction.<sup>90</sup> Thus, the same criticisms that are directed toward the doctrine of economic efficiency also apply to utilitarianism.<sup>91</sup>

## 2. Why Libertarianism Does Not Support Enforcement of Consumer Promises

According to Fried and general libertarian theory, whether a consumer is morally obligated to keep his promises depends upon whether he has "intentionally" invited the confidence of the merchant.<sup>92</sup> Stated another way, a consumer is morally bound if the promise is an exercise of his free will.<sup>93</sup> The key to understanding the concepts of "intentional choice" and "free will" is the importance libertarians place on the need for society to respect each individual as a moral being. To be so respected, it is essential that each person be given the freedom to form true and rational judgments and to act on them.<sup>94</sup> The law must respect the individual's right to make his own choices and to determine his own values as long as it is not at the expense of others.<sup>95</sup> By not taking his choice seriously, society is substituting its judgment for the promisor's. It seems, though, that only when the individual has truly

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87. See P.S. ATIYAH, *supra* note 54, at 30; Epstein, *supra* note 2, at 293. In discussing utilitarianism, I will be referring to rule utilitarianism and not act utilitarianism. It is unlikely that an act utilitarian would believe that, as a general matter, there is a moral obligation to perform all promises. See Smart, *An Outline of A System of Utilitarian Ethics*, in *UTILITARIANISM FOR AND AGAINST* 9-12 (1973). See generally D. LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965).

88. See D. LYONS, *supra* note 87, at 118-60.

89. See P.S. ATIYAH, *supra* note 54, at 30-31.

90. See R. POSNER, *supra* note 40, at 10 (defining economic "efficiency" as "[the exploitation of] economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized.") (emphasis in original); Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 597-99 (arguing "that wealth maximization . . . is structurally identical to utilitarianism.").

91. See Kornhauser, *supra* note 90, at 597.

92. See *supra* note 65 and accompanying text.

93. See P.S. ATIYAH, *supra* note 54, at 203; C. FRIED, *supra* note 63, at 16.

94. See C. FRIED, *supra* note 63, at 78.

95. Kronman, *supra* note 64; Epstein, *supra* note 2, at 293, stating: "One of the first functions of the law is to guarantee to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties. . . ."

determined his own values is such respect merited. When conditions make it difficult to form rational judgments, the legal system does not show disrespect when it attempts to provide an environment in which such judgments are possible. When a person does not have sufficient information he cannot knowingly choose his own destiny, and society does not fail to take him seriously when it refuses to honor that choice.<sup>96</sup> Similarly, when he lacks the analytical ability to be value-maximizing, he does not exercise self-determination.<sup>97</sup> When psychological and other exterior pressures prevent him from knowing and pursuing his true desires, society does not fail to respect him by ignoring his promise.<sup>98</sup>

At least one of these problems exists in most consumer transactions. Most consumers are not sufficiently informed about a product to make rational choices. Even when fully informed, it is the rare consumer who has the ability to rationally evaluate the information in light of his goals. Furthermore, advertisers and salesmen often successfully manipulate a consumer's perceptions of his own wants and needs and thereby disrupt his evaluative process.<sup>99</sup> To allow a consumer the autonomy to bind himself in these circumstances is simply to permit him to be manipulated by others. There will be times when a consumer is fully informed, has the ability to evaluate the bargain and is free from all external pressures. Under these circumstances, he may be making a truly free choice. Seldom does such a choice result in a substantially unfair bargain.

In a sense the consumer "intentionally" or freely invokes the convention of promising.<sup>100</sup> When he makes a purchase, he intends to buy something. He intends to purchase a product which he believes consists of certain qualities. Because of inadequate information or defective evaluative skills, the product he purchases may differ from the one he intended to buy. In this situation, it is not accurate to say that he intended to purchase this product. An analogy may be helpful. You invite into your house a man you believe works for the telephone company. In fact, he is a burglar. You have intended to let a telephone repairman into your house. You may have accidentally or negligently invited the burglar into your house, but you did not do so intentionally. A consumer's negligent failure to acquire all the necessary information may make the consumer morally culpable for the merchant's loss. However, it is a different moral obligation than the one which arises when one intentionally makes a promise.

Fried and other libertarians acknowledge that free will means more than just freedom from physical or economic duress.<sup>101</sup> Fried believes that a promisor has no

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96. Cf. Kronman, Book Review, *supra* note 71, at 418-19 (noting that a party to a contract who has made a unilateral mistake "cannot be said to have assumed a promissory obligation: the duty to keep a promise 'does not take hold where the promisor has not knowingly undertaken that obligation.'" (quoting C. FRIED, *supra* note 63, at 81).

97. Cf. Epstein, *supra* note 2, at 300 (noting that the contractual obligation of a party whose competence is in question due to insanity, drunkenness, or infancy should not be enforced).

98. See Atiyah, *supra* note 1, at 527.

99. See generally H. MARCUSE, *supra* note 53, at 4-14.

100. See G.E.M. Anscombe, *The Two Kinds of Error in Action*, in *ETHICS* 279-88 (J. Thomson and G. Dworkin eds. 1968).

101. See C. FRIED, *supra* note 63; Epstein, *supra* note 2, at 298 (discussing "[t]he case against fraudulent misrepresentation").



moral obligation to keep a promise which is not knowingly made or is based upon insufficient information, although there may be equitable or other reasons for legally compelling its performance.<sup>102</sup> Yet Fried believes there is a moral obligation to keep most consumer promises.<sup>103</sup> Fried must either mean something very different by "free will," or he fails to see the extent to which consumer decisions are based upon imperfect information or are the result of manipulation by advertisers and salesmen.

Assuming that a consumer is morally obligated to keep his promises, the question of whether merchants have the moral standing to enforce those obligations remains. The merchant must respect the consumer as a moral being if he is to be accorded standing to enforce the consumer's moral obligation. To show respect, according to the liberal ideal, the merchant must leave consumers "free to make their lives as [merchants] are left free to make [their own]."<sup>104</sup> This requires that the merchant allow the consumer to determine his own values and to make his own choices in acting upon those values. Unless the merchant accords the consumer this respect, it is difficult to see why the consumer should have a correlative obligation to respect the merchant by keeping his promise.<sup>105</sup>

Merchants, in their dealings with consumers, frequently do not show such respect.<sup>106</sup> Instead, they attempt to use consumers as a means of promoting their own welfare. Advertising and sales techniques are designed to deprive the consumer of his ability to determine and act upon his own values. Advertising campaigns stimulate false wants and mislead consumers into believing that the product advertised will satisfy their true desires. Sales techniques may consciously attempt to misinform consumers by failing to disclose relevant information. Unless the product is of a type repeatedly purchased by a consumer, the advertisers and salesmen may not care whether the consumer is satisfied with the purchase. The consumer must "want" their product only long enough to purchase it.

Fried and other libertarians acknowledge that a promisee who has procured a promise by immoral means has no standing to enforce that promise.<sup>107</sup> They believe, though, that any legally permissible form of advantage-taking is an individual's moral right.<sup>108</sup> Thus, they distinguish fraud or lying, which is legally impermissible, from the failure to disclose information when such failure is not legally proscribed.<sup>109</sup> But the issue is not one of legality. Rather, it is whether the merchant is permitting the consumer to make his own true and rational judgments. In this regard, neither a merchant who knowingly fails to disclose information nor one who knowingly manipulates the consumer treats the consumer with the respect due him as a moral being. There may be economic reasons for permitting the merchant to treat the

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102. See C. FRIED, *supra* note 63, at 81; Kronman, *supra* note 71, at 419.

103. See C. FRIED, *supra* note 63, at 83; Kronman, *supra* note 71, at 420; Atiyah, *supra* note 1, at 517.

104. See C. FRIED, *supra* note 63, at 7.

105. See Atiyah, *supra* note 1, at 527; H. MARCUSE, *supra* note 53, at 4-14.

106. See Atiyah, *supra* note 1, at 527; H. MARCUSE, *supra* note 53, at 4-14.

107. See C. FRIED, *supra* note 63, at 78; Epstein, *supra* note 2, at 298.

108. See Kronman, Book Review, *supra* note 71, at 406.

109. See C. FRIED, *supra* note 63, at 78-85; Epstein, *supra* note 2, at 298-99.

consumer disrespectfully, but there seems to be no justifiable moral reason.<sup>110</sup> Advertisers and salesmen do not respect the right of consumers to make their own choices. Instead, their attempt to determine consumer choices and values demonstrates the utmost arrogance and disrespect for consumers.

Not allowing merchants to take advantage of consumer ignorance or ineptness is consistent with the doctrine of unconscionability under Uniform Commercial Code § 2-302. There is no attempt to disturb the "allocation of risks because of superior bargaining power"; there is only an attempt to prevent "oppression and unfair surprise."<sup>111</sup> Contracting parties with equal access to information and equal analytical ability sometimes reach unequal bargains when one of the parties possesses a scarce commodity. Notwithstanding the driving of a hard bargain, the seller honors the autonomy of the buyer by not interfering with the buyer's decision-making process.<sup>112</sup> The seller may be, as Fried argues, under no altruistic duty to share the benefits of his good fortune.<sup>113</sup> He simply must allow the buyer to make his own choice. The problem in most consumer transactions is not the driving of a hard bargain. Even assuming that there is nothing morally objectionable about a merchant charging what the market will bear for a desired commodity, there is a problem when he refuses to allow the consumer the opportunity to make a rational choice. Advertisers and salesmen do not want consumers to make value-maximizing purchases. Their sole intent is to cause consumers to purchase their products. Refraining from this manipulation does not require an altruistic action on the seller's part. His moral fault lies not in exploiting the market for his product, but in knowingly taking advantage of the consumer's irrationality.

All merchants benefit from advertisers' attempts to misinform consumers. Even merchants who do not themselves disseminate misinformation know that they are able to sell their products primarily because of the products' advertisements. When advertisers have misinformed consumers, retailers who have benefitted from those sales cannot claim moral purity. If sales techniques and advertising were designed simply to inform consumers of a product's attributes so they could make rational choices, a stronger argument could be made that consumers are morally obligated not to disappoint the expectations of innocent merchants. But merchants are not innocent when they allow consumers to make irrational choices. To have moral standing, merchants should inform consumers of all relevant facts, refrain from attempting to influence consumers' decisions, and correct any misconceptions of which the merchants are aware. Nothing prevents legal rules from being drafted to protect this rather unusual merchant.

Concluding that he is not morally obligated to keep his promise does not mean that the consumer is not morally obligated to pay for what he has received. When the merchant reasonably relies upon the consumer's promise, the merchant may have moral grounds to argue that the consumer is obligated to reimburse him for his

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110. See generally H. MARCUSE, *supra* note 53.

111. U.C.C. § 2-302 comment 1 (1977).

112. See C. FRIED, *supra* note 63, at 77-78.

113. *Id.* at 90-91.

losses.<sup>114</sup> This moral obligation is based upon the fact that the consumer's negligent act hurt the merchant, which act does not arise solely from the consumer's promise.<sup>115</sup> Legal rules should be formulated to protect the merchant's legitimate interests while at the same time protecting the consumer against attempts to thwart the exercise of free will.

## B. Economic Efficiency

### 1. Standards for Determining Efficiency

In determining whether it is economically efficient to enforce consumer promises, it is necessary to define the term "efficiency." There are two different interpretations of "efficiency": wealth maximization and allocative efficiency.<sup>116</sup>

A rule is wealth maximizing when it permits the dollar value of goods and services traded on the market to be maximized.<sup>117</sup> Judge Richard Posner states it as follows: "[e]fficiency" means exploiting economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized."<sup>118</sup> A legal rule is wealth maximizing when it permits the most efficient utilization of our resources. A rule enforcing consumer promises is wealth maximizing if consumers best know their own preferences. Thus, enforcing consumer promises would encourage the manufacture and sale of those products most valued by the public.

A rule is allocatively efficient when one contracting party cannot be made better off without making the other contracting party worse off (also called "Pareto optimality").<sup>119</sup> Voluntary exchanges are allocatively efficient if they result in shifting goods to their most highly valued uses.<sup>120</sup> Assuming that each contracting party best knows his own preferences, no voluntary exchange would take place unless the purchaser subjectively valued the good more than the seller.<sup>121</sup> Thus, a rule encouraging voluntary exchanges is allocatively efficient if each party best knows his own preferences, since each will be made better off by the exchange.<sup>122</sup> A rule which facilitates bargaining or reduces the costs of bargaining is allocatively efficient because one party can be made better off without making the other party worse off.<sup>123</sup>

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114. See P.S. ATIYAH, *supra* note 54, at 184, 193 (1981) (arguing that a promise to pay for a product is an admission of an obligation).

115. See *id.* (noting that an obligation may arise "because one person has done some harm to another, and in the context with which we are concerned, the type of harm which commonly arises is harm following some action (detrimental reliance) induced or encouraged by another person.").

116. Kornhauser, *supra* note 90, at 592; Kornhauser, *The Resurrection of Contract* (Book Review), 82 COLUM. L. REV. 184, 188 (1982) [hereinafter Kornhauser, Book Review].

117. See Kornhauser, *supra* note 90, at 595-97; Kornhauser, Book Review, *supra* note 116, at 188.

118. R. POSNER, *supra* note 40, at 10 (emphasis omitted).

119. Kornhauser, *supra* note 90, at 593; Kornhauser, Book Review, *supra* note 116, at 188; A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 n.4 (1983).

120. See Kornhauser, Book Review, *supra* note 116, at 188-89; R. POSNER, *supra* note 40, at 9-10.

121. See R. POSNER, *supra* note 40, at 9-11.

122. See Slawson, *supra* note 4, at 554 (discussing allocation of resources in the sense that when "the market is working free from improper influence," then prices set by the market "tend toward an optimum allocation of resources and are an incentive to efficiency.").

123. See *id.*

This is true regardless of which party receives the savings otherwise wasted on unnecessary transaction costs.

## 2. *Is Enforcing Consumer Promises Economically Efficient?*

Given the present consumer market environment, rules which enforce consumer promises are neither allocatively efficient nor wealth maximizing.

### a. *Wealth Maximization*

To be wealth maximizing, rules enforcing consumer promises would have to maximize the value of goods and services traded on the market.<sup>124</sup> Value is measured by the actual price a purchaser is willing to pay for a product.<sup>125</sup> It is difficult to determine price in the abstract. Many economists believe that the only way to make this determination is to observe actual consumer purchases.<sup>126</sup> As a result, value is the price consumers in fact pay for the product.<sup>127</sup> The value of human satisfaction is thus measured at the time of purchase.

Value should not be measured by what consumers pay. If we desire to have an economy wherein enjoyment or satisfaction is maximized, value should be measured by determining what consumers would be willing to pay if they had full information as well as the ability to rationally process this information.<sup>128</sup> This may be referred to as the "true value" of a product. Because these conditions do not exist, we cannot know the true value of products. Yet it is clear that a rule requiring disclosure of complete product information and proscribing advertising and salesmanship designed to hinder a consumer's ability to make a rational choice would clearly result in prices more closely approximating the true value of goods and services than they do now. As a result, such a rule would be wealth maximizing.

When we enforce consumer promises, we are encouraging the manufacture and marketing of the products that the public buys. Manufacturers are only motivated to produce better products if they can increase their profits. But since it is more likely that sales and profits will be increased by better advertising campaigns rather than by making a better product, there is often more incentive to spend money on advertising rather than improving product quality. Many, therefore, choose the advertising route. When consumers do not have adequate information to choose the best available product, enforcing their promises simply encourages the manufacture and sale of the product they choose. Even if consumers are able to identify their own desires, lacking adequate information and evaluative ability, they often do not choose the product which best suits these desires.<sup>129</sup> Only by adopting rules which encourage consumers to make a satisfaction maximizing purchase do we encourage long term efficiency and productivity. By enforcing promises made upon imperfect information or

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124. See *supra* note 117.

125. R. POSNER, *supra* note 40, at 10-12.

126. *Id.* at 11.

127. *Id.* at 10.

128. See Schwartz & Wilde, *supra* note 3, at 632-33; Birmingham, *supra* note 15, at 366.

129. See Schwartz & Wilde, *supra* note 3, at 632-33; Birmingham, *supra* note 15, at 366.

defective evaluative abilities, we encourage the use of resources to manufacture products which consumers may buy, but which will not give them the most satisfaction. These same resources could be used to make products which would be more highly valued by consumers.

To encourage the manufacture and sale of better products, advertising and salesmanship must be encouraged to communicate objective, informative facts. Yet, by enforcing consumer promises, we encourage instead the present advertising and sales techniques which deceive consumers. There is no economic reason for the encouragement of advertising and sales talk directed toward creating inaccurate and misleading beliefs.<sup>130</sup> No economic benefit is realized by rules permitting salesmen to tell a consumer the positive virtues of a product while ignoring or coloring its negative aspects. Wealth would be maximized if legal rules discouraged such advertising and salesmanship, provided the cost of regulation would not be too high. Presently such activities are not discouraged. Even when the salesman may be subject to tort liability for his misleading or incomplete representations, the threat of such liability is often greatly outweighed by the prospect of unusually high profits.

It is no answer that a diligent consumer could find out the necessary information. This would be relevant only if it were more efficient for each consumer to independently search for the information rather than for the seller to supply it.<sup>131</sup> As will be subsequently discussed,<sup>132</sup> the likelihood of this proposition is extremely doubtful. There may be some benefit in rewarding consumers who actively seek information or who are better at bargaining. By allowing them to obtain a better price, we encourage other consumers to learn these skills. If this encouragement were sufficient to cause a substantial percentage of the public to become more educated and careful, this would be a reason for maintaining our current rules. But the ability to shop, research, and bargain depends so much upon a person's natural abilities and educational background that we have not yet seen a trend on the part of the public to become more educated consumers.

#### b. *Allocative Efficiency*

An exchange is allocatively efficient if one party cannot be made better off without making the other party worse off. It has often been argued that voluntary exchanges are allocatively efficient since neither party would make the exchange unless he believed that it would make him better off. In order to make the exchange each must believe that what he is giving up is less valuable than what he is receiving. Thus, exchange operates to move resources from less valuable to more valuable uses. To the extent that the consumer does not know his own preferences, however, he may be made worse off by the "voluntary transaction." To the extent that the price a consumer pays for a good exceeds the value he places upon the good, such a

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130. See R. POSNER, *supra* note 40, at 82.

131. See Easterbrook & Fischel, *supra* note 16, at 681-82 (noting that mandatory disclosure of securities information will prevent the redundant production of information by individual investors); Coffee, *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 733 (1984).

132. See *infra* note 185 and accompanying text.

voluntary transaction would be allocatively inefficient.<sup>133</sup> In order for a voluntary exchange to be allocatively efficient, each individual, at the time of the exchange, also must know the true costs and benefits of making the exchange. When he does not have complete information, he is unable to evaluate the relative costs and benefits properly, and therefore cannot know whether he will be made better off as a result of the exchange. Even when he has complete information, he may not have the ability to evaluate the information properly, and thus may not be making an allocatively efficient exchange. In these situations, the resources may move to less valuable uses. It is apparent that because of the methods of advertising and salesmanship, as well as their lack of evaluative ability, most consumers are not able to accurately value the products they purchase. As a result, a rule that allows such exchanges is not allocatively efficient.

It has also been argued that a rule that facilitates bargaining or reduces the costs of bargaining is allocatively efficient, since each party can be made better off without making the other party worse off. Conversely, any rule which imposes costs on an exchange reduces its allocative efficiency. This is true, though, only if we assume that the exchange itself would otherwise be allocatively efficient. If allowing for exchange results in making the merchant better off at the expense of the consumer, a rule whose costs help the consumer make a more informed choice would be allocatively efficient if the increased value of his rational choice exceeds the added costs imposed by the rule.

In particular, it has also been argued that refusing to enforce consumer promises discourages sales by merchants and makes planning difficult.<sup>134</sup> Unless a merchant can be assured that he will be paid, he will not extend credit. He will demand a cash payment, thus requiring the consumer to seek credit elsewhere. This will preclude certain consumers from obtaining credit, will increase the overall cost of goods, and will raise the cost of consumer transactions.

A rule completely prohibiting the enforcement of consumer promises would make it somewhat more difficult for consumers to obtain credit and would, to some extent, raise prices. A rule which refused to protect a merchant's expectancy losses, but which did allow some recovery, may quite possibly cause only a minimal increase in prices. At present, many merchants do not rely on their legal remedies upon a consumer's breach. Many merchants plan by assuming that a certain percentage of consumers will breach.<sup>135</sup> Many other merchants fail to pursue legal remedies even when there is a breach.<sup>136</sup> Still others voluntarily take products back from dissatisfied consumers.<sup>137</sup> When a consumer purchases a product with which he is satisfied, the possibility that he will want to return the product is greatly decreased. Furthermore, when the consumer is fully informed, the price that he pays will more closely

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133. See *supra* note 122.

134. See Eisenberg, *supra* note 1, at 744.

135. See Eisenberg & Cooter, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1434, 1449 (1985).

136. *Id.* at 1475.

137. *Id.* at 1473 (noting that "many and perhaps most schools provide for refunding tuition on a declining basis if the student drops out.").

approximate the price the merchant can obtain upon resale. As a result, fewer losses will be suffered by merchants.

#### IV. DIFFICULTIES WITH SUBSTANTIVE REGULATION

Regulation of consumer transactions can take one of two forms.<sup>138</sup> First, through substantive regulation, courts can protect consumers against unfair bargains. By refusing to enforce unfair bargains, courts encourage merchants to supply information and otherwise refrain from taking advantage of consumers. The second form of regulation improves the efficiency of the market by increasing available information and remedying the inability of consumers to evaluate information. Although there may be room for supplemental substantive regulation, the second form of regulation is far more promising.<sup>139</sup>

When a court engages in substantive regulation, it determines that the bargain reached by the parties is unfair. In order to do so, the court must decide what a fair price would be.<sup>140</sup> There are three possible ways of determining a fair price. First, the court could determine the absolute value of the product. Second, the court could adopt the market price of the product. Third, the court could use the lowest price at which the product is available, and allow for any additional costs reasonably incurred by the merchant.<sup>141</sup> Upon examination, we will see that neither of the first two measures is feasible. The third, having its own difficulties, still may be useful in supplementing the remedies discussed in the next section.

##### A. Products Have No Absolute Value

Products have no absolute value.<sup>142</sup> Stripped of a market in which someone offers to purchase the product, no value can be assigned to any product. Courts have no basis other than their own subjective judgment, or their estimate of the judgment of a hypothetical consumer, for pricing these products. How much is a painting by Matisse worth? Is a diamond intrinsically worth any more than an ordinary rock? One could not say whether a Fila tennis shirt is worth \$20 or \$100. A rule which measured a fair price by the absolute value of the product would be unworkable.<sup>143</sup>

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138. Schwartz & Wilde, *supra* note 3, at 633, 667.

139. *Id.* at 635, 667; see Comment, *supra* note 3, at 1176.

140. See Schwartz & Wilde, *supra* note 3, at 633-34, 667; Slawson, *supra* note 4, at 553-54 (noting that a high price may be justified by market conditions).

141. For a similar proposal see Speidel, *supra* note 4, at 372-73.

142. See Gordley, *supra* note 4, at 1592; Eisenberg, *supra* note 1, at 745-46.

143. Even where a determination appears to be largely economic, an objective value often cannot be placed on the intangible interests involved. See Leff, *supra* note 2, at 513-15. For example, how does one place an objective value on a five-year extended warranty on a washing machine? Let us assume that there is a 15% chance of the washing machine needing major repairs which would cost an average of \$100. There is also a 1% chance of the machine needing a complete overhaul costing \$400. How much is the five-year extended warranty worth? A consumer may value the peace of mind he would acquire at \$80 while an economist may value the warranty at only \$30.

## B. Difficulty of Measuring Market Price

Without the availability of comparable price information, determining a "market price" for a consumer product turns out to be only a slight improvement over a court's subjective determination of an absolute price. Different stores charge different prices for identical products. The difference, while minor in some cases, will be quite substantial in others. This difference may be attributable to differing profit margins or costs or both, *i.e.*, rent, advertising expenses, insurance, wages, and wholesale prices. There is no basis for choosing as the market price one store's prices rather than another's. When comparable price information is available, the prices will tend to equalize.<sup>144</sup> When consumers know the prices of all stores, most consumers will shop at the store with the lowest prices.<sup>145</sup> At this point, notwithstanding their higher costs, higher priced sellers will have to reduce their prices in order to attract customers. Without comparable price information, the costs of acquiring this information may deter enough buyers from shopping around, thus providing enough customers to make it profitable for a merchant to continue charging higher prices.<sup>146</sup>

Without comparable price information, it is not possible to determine a single market price. Moreover, difficulties are presented when attempting to define the "market" in which the price is to be determined. These difficulties can be divided into geographical and product differentiation problems.

### 1. Geographical Problems in Defining Market

A market extends geographically to the point when changes in the price of the product at one store in the market affect the demand and thus the price at other stores in the market.<sup>147</sup> To the extent that a price change does not have this effect, stores are not in the same market. In the case of consumer goods, whether stores are in the same market depends upon whether the costs, both monetary and nonmonetary, of shopping at one store rather than another are so great as to discourage sufficient shoppers from switching stores, notwithstanding lower prices.<sup>148</sup> Assuming consumer knowledge of the price differential, a low enough price may be sufficient inducement for some consumers to shop at the other store. Thus, two stores may be in the same market to the extent that there is a high cross-elasticity of demand between the stores' products.<sup>149</sup>

Even when two stores are in the same city, they may be in different markets.<sup>150</sup> Shoppers may seldom shop at a store outside of their neighborhood, no matter how

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144. See Eisenberg, *supra* note 1, at 778.

145. See Comment, *supra* note 3, at 1175-76.

146. *Id.* at 1174-75.

147. See R. POSNER, *supra* note 40, at 221, 223. See also *Tampa Elec. Co. v. Nashville Co.*, 365 U.S. 320, 237-38 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5 (1949); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963).

148. See Schwartz & Wilde, *supra* note 3, at 643-44.

149. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-95 (1955). See also E. MANSFIELD, *MICROECONOMICS* 121-22 (4th ed. 1982).

150. See Leff, *supra* note 2, at 505, 553.



substantial the price differential may be.<sup>151</sup> This reluctance may be caused by price ignorance, time limitations, transportation costs, language problems, or psychological barriers.<sup>152</sup> For purposes of illustration assume that two such markets in New York City are Harlem and the Lower Eastside (where many discount appliance stores are located). Many residents of Harlem confine their shopping entirely to Harlem.<sup>153</sup> They may have never shopped on the Lower Eastside. Each person may have his own reasons. Some consumers do not know of the difference in prices.<sup>154</sup> Others cannot afford the time it would take to go to the Lower Eastside. Others, though, are simply shy, and unwilling to leave Harlem.<sup>155</sup> They are unprepared psychologically and emotionally to deal with people outside of their neighborhood. Some may not have the means to transport their purchases back to Harlem and merchants on the Lower Eastside may not deliver there. Prices of freezers are substantially lower on the Lower Eastside than in Harlem.<sup>156</sup> Assume that a consumer in Harlem has to pay \$800 for a freezer which sells for \$500 on the Lower Eastside. Is the relevant market limited to Harlem or are the stores on the Lower Eastside to be included?

There are problems with treating Harlem as a separate market and determining the market price solely by reference to the prices found there. The higher prices in Harlem may represent profits for the merchant over and above his additional costs of doing business there.<sup>157</sup> He is able to reap these higher profits either because of consumer ignorance or fear of shopping in other areas.<sup>158</sup> Permitting merchants to take advantage of consumers in these situations is justified neither by moral nor economic considerations. It may be contended that when prices are supracompetitive new merchants will enter the market, thereby causing a competitive price.<sup>159</sup> This is not necessarily true. There may be as many merchants as the market can support.<sup>160</sup> The existing merchants may not undercut each other's prices because they realize that an increase in sales volume through price reduction would be more than offset by a lower profit margin on each sale. Even if the market could support additional merchants, there may be barriers preventing entrance into the market.<sup>161</sup> One barrier may be predatory practices by present merchants who lower their prices when a new merchant tries to enter the market.<sup>162</sup> The established merchants may thereafter raise their prices when the threat of entry has passed. Another barrier may be the difficulty of doing business in Harlem. The increased risk of crime may scare off potential merchants who believe that the chance of successfully entering the market is not worth the extent of the potential losses.

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151. *Id.*

152. See Note, *Consumer Legislation and the Poor*, YALE L.J. 745, 751 (1967); Leff, *supra* note 2, at 505. But see Brandt & Day, *supra* note 34, at 321-22.

153. See D. CAPLOVITZ, *THE POOR PAY MORE* 2-4, 49-57 (1967).

154. See Note, *supra* note 152, at 749; D. CAPLOVITZ, *supra* note 153, at 14-15, 85-87.

155. See Note, *supra* note 152, at 750-51; D. CAPLOVITZ, *supra* note 153, at 49 n.1.

156. See Note, *supra* note 152, at 754-57.

157. See D. CAPLOVITZ, *supra* note 153, at 15-20.

158. See Note, *supra* note 152, at 750-51. But see Brandt & Day, *supra* note 34, at 321-22.

159. See R. POSNER, *supra* note 40, at 8, 198-99.

160. *Id.* at 208, 232.

161. *Id.* at 198-99, 232.

162. *Id.* at 224.

On the other hand, including the Lower Eastside prices in determining the market price has its problems. If we allowed a merchant in Harlem to recover only the price that is charged on the Lower Eastside, he may be denied his legitimate additional costs of doing business there.<sup>163</sup> Doing business in Harlem may cost more because of increased insurance or security expenses.<sup>164</sup> Furthermore, because of a higher crime rate, merchants may legitimately need some additional incentive to conduct business there.<sup>165</sup>

Supplying comparable price information would help to alleviate this problem. When the prices were known to be substantially higher, more consumers would go to the Lower Eastside to make their purchases. The prices in Harlem would more closely approximate the prices on the Lower Eastside even though some consumers would still not shop outside of Harlem because of the difficulty or fear of traveling.

Similar geographical problems in isolating the market exist with stores in wealthy areas like New York's Fifth Avenue,<sup>166</sup> as well as convenience stores, door-to-door salesmen,<sup>167</sup> television, radio, and telephone sales, and mail order catalogue sales.

## 2. Product Differentiation Problems in Defining Market

In establishing a market price for a product, a determination must be made as to what constitutes the product. Even identical products sold on identical terms by different stores are to some extent different products.<sup>168</sup> Take as an example the sale of an RCA 19-inch color television set. The television set may sell for \$450 at a large department store, for \$375 at an electronics store, and for \$275 at a discount store. It can be argued that each of these identical television sets is a different product. The department store is selling not only the television set but the convenience of being able to shop for diverse products at a single location. It must have a large stock of diversified goods, many of which it may ultimately sell at a loss. The electronics store offers a substantial inventory of different brands of television sets together with knowledgeable salesmen who must be paid higher salaries or commissions or both because of their expertise. The electronics store likewise has many brands which have to be sold ultimately at a loss. With both of these retailers, their liberal return policy and known financial stability come at a price. The discount store stocks only television sets that turn over rapidly. They therefore have little remaining to sell at a

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163. See Comment, *supra* note 3, at 1169-71.

164. See Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. Rev. 1, 15 (1969); Comment, *supra* note 3, at 1169-71.

165. These extra legitimate costs do not include costs associated with a higher default rate on loans since cash sales do not include this risk. Even in a credit sale, factoring into the cash price a premium for a higher default rate in effect allows the merchant to charge more than the legal rate of interest for the loan. This rate should not be inflated by allowing resort to the time-price differential doctrine. Under the time-price doctrine, a seller may charge one price for cash sales while another for credit sales. See *Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 118-19 (1861). In *State v. J.C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970), the Wisconsin Supreme Court rejected defendant-retailer's argument that its monthly charge on the declining unpaid balance of its revolving charge account constituted a time-price sale. Thus, this monthly charge was a "forebearance" within the state's usury laws, which defendant retailer had therefore violated.

166. See Eisenberg, *supra* note 1, at 778-79.

167. See Eisenberg, *supra* note 1, at 779.

168. See Comment, *supra* note 3, at 1177-79.

loss. By buying a limited selection of television sets, the discount store is able to purchase at a greater volume discount. It employs few salesmen and gives little service. Without comparable price information, it is impossible to know how the market values these differences. If comparable price information were furnished by each of these stores, customers could then value the advantages offered by each. Sufficient numbers of consumers may not be willing to pay for the cost of the department store's additional services.<sup>169</sup> The department store may then be required to lower its price to an amount which represents the marginal value to consumers of these additional services. If this value is less than the cost of supplying the services, the store may discontinue the services. Thus, it is likely that the price disparity between stores would be greatly reduced. Similar problems exist when identical goods are sold on different terms.<sup>170</sup>

When there is imperfect product quality information, a consumer may pay more for a product than he would for a functionally equivalent product. The lack of information often causes consumers to purchase inferior yet higher priced products. But comparing different products involves an element of purely subjective valuation. It may be difficult for a court to determine whether a price disparity is the result of imperfect information, defective evaluative analysis, or an honest disagreement as to relative value. For instance, the value of a better repair record may depend, to some extent, upon the consumer's fear of uncertainty and upon his inability to determine the economic value of allocating certain risks. With complete product quality information, it would be more likely that the higher priced product would be the one that rational consumers subjectively prefer.

### *C. Shifting Burden of Proof to Merchant*

Since with comparable price information a consumer most likely would purchase a product at the lowest price available, a fair price should be presumed to be the lowest price at which the consumer could purchase the product. The merchant could then be allowed to prove any additional costs which justify his charging a higher price. The court would have to determine whether these additional costs were reasonable and should be borne by the consumer. Though it has been suggested that courts look at the average price,<sup>171</sup> by looking to the lowest price at which the product is sold, courts have a definite price upon which to base recovery. Had the consumer been furnished this information, he might have shopped at the lower priced store.<sup>172</sup> Yet the higher priced merchant may have offered benefits not found at the lower priced store. The consumer may have chosen to pay a premium for these benefits. Furthermore, with sufficient effort, the consumer could have discovered the lower priced store. As a result, the merchant should not be denied compensation for his

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169. *Id.* at 1178.

170. *Id.* at 1177-79.

171. See Speidel, *supra* note 4, at 372.

172. *Id.* Obviously, factors such as taste, convenience, and utility come into play. See R. POSNER, *supra* note 40, at 85 ("[W]hat is important is not whether there is haggling in every transaction but whether competition forces sellers to incorporate in their standard contracts terms that maximize the purchasers benefits from transacting.").

additional costs of doing business. A court would presumably include these additional costs only to the extent that they are reasonable. However, even this measure of a fair price has its problems. The primary obstacle is the judicial, attorney, and litigant time required to make this determination. Each lawsuit would, to some extent, involve exploration of the merchant's business and accounting practices. Second, an element of uncertainty would be introduced into the pricing practices of merchants.

Far more difficult problems arise when different products are involved. If the consumer had been fully informed, he presumably would have purchased the best product possible within a given price range, or the lowest priced product of a given quality. Theoretically, it would be possible to determine a fair price by finding the lowest price at which the consumer could have purchased a functionally equivalent product of a similar quality. The merchant could then have the right to prove that his product is superior or that he offers additional services or benefits not offered by other merchants. This standard would be unworkable. It would be feasible only when products were almost identical in all aspects. If there were quality or other differences, the court would have to make a subjective judgment as to the monetary value of these qualitative differences.

## V. TOWARD A MORE EFFICIENT ECONOMY

In order to make our economy more efficient, it will be necessary to eliminate both informational deficiencies and evaluative disabilities. There are no compelling moral or economic reasons to enforce unequal bargains resulting from either of these inadequacies. It would appear that mandatory disclosure of product information is morally and economically mandated. But two types of objections have been voiced against mandatory disclosure. First, the costs of requiring disclosure would exceed the benefits.<sup>173</sup> Second, previous mandatory disclosure schemes have failed, owing to the inability of consumers to process the information disclosed.<sup>174</sup> Both of these objections will be examined.

### A. *Mandatory Disclosure*

In evaluating the feasibility of a mandatory disclosure system, several related but distinct questions arise. First, should there be a mandatory disclosure system? Second, who should administer the system? Third, what information should be disclosed, in what form, and by whom?

#### 1. *Should There Be a Mandatory Disclosure System and Who Should Administer It?*

There is an enormous number of different types of products on the market. There are also new products being developed daily. The information that needs to be disclosed will differ depending upon the type of product involved. Questions that

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173. See R. POSNER, *supra* note 40, at 83; Comment, *supra* note 3, at 1156.

174. See Landers & Rohner, *supra* note 19, at 722.

must be answered include whether disclosure should be required at all as to certain products, and whether the retailer or the manufacturer should make the disclosure. It seems unlikely that a statutory scheme administered by the courts could accomplish the necessary tasks. No statutory scheme could be detailed enough to specify the information needed to be disclosed and yet flexible enough to allow for product innovation. Courts would be constantly required to decide whether disclosures made about new products complied with statutory requirements not drafted with these products in mind.

A more sensible solution would be the formation of an agency for the express purpose of administering a mandatory disclosure system for consumer goods.<sup>175</sup> There will, of course, be substantial costs in establishing such an agency.<sup>176</sup> The direct costs would include the costs of compiling and disseminating the information as well as the costs of litigating whether there has been compliance.<sup>177</sup> There will be the costs of establishing and administering the agency itself.<sup>178</sup> There will also be substantial indirect costs.<sup>179</sup> If the penalties for inaccurate disclosures are stiff, sellers may be hesitant to disclose any more information than required, even though they may now supply such information.<sup>180</sup> There are also the opportunity costs of participating in the disclosure system.<sup>181</sup> If disclosure was not required, these individuals could spend their time on more productive activities. In addition, consumers may have to spend more time searching through the disclosed information to find the specific information they find relevant.<sup>182</sup>

On the other hand, by increasing the information available, consumer purchases would be more rational.<sup>183</sup> This would encourage the manufacture of better and lower priced products. Less resources would be wasted on manufacturing, advertising, and selling inferior or fraudulent products. Entrepreneurs would spend time on constructive projects rather than on new schemes to mislead consumers. A tremendous amount of consumer time, as well as the time of consumer protection publications and groups, including state consumer fraud agencies, would be saved.<sup>184</sup> At present, each consumer is required to search for the relevant information. If the information were compiled and disseminated by the manufacturer or the retailer, the deadweight loss attributable to the duplicative efforts of consumers discovering this information would be eliminated.<sup>185</sup> Consumers would not have to spend substantial amounts of time and transportation costs finding the lowest price or reasonable substitute

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175. See Schwartz & Wilde, *supra* note 3, at 678-79; Comment, *supra* note 3, at 1181.

176. See Comment, *supra* note 3, at 1156; R. POSNER, *supra* note 40, at 83.

177. See Easterbrook & Fischel, *supra* note 16, at 707.

178. *Id.*

179. See *id.* at 708-09.

180. *Id.* at 709.

181. *Id.* at 707.

182. *Id.* at 709.

183. *Id.* at 709.

184. See Coffee, *supra* note 131, at 733; Landers & Rohner, *supra* note 19, at 714.

185. See Easterbrook & Fischel, *supra* note 16, at 682; Coffee, *supra* note 131, at 733.

products.<sup>186</sup> If there was stiffer liability for supplying misinformation, consumers would save time in not having to verify information furnished by the seller.<sup>187</sup>

Disclosure would also tend to discourage disreputable sellers from entering the market.<sup>188</sup> Most legitimate manufacturers or retailers make substantial information about their products available. Mandatory disclosure would not be tremendously costly to them. Less legitimate manufacturers or retailers may be selling products that have not been adequately tested or whose test results are negative.<sup>189</sup> Requiring disclosure would encourage these manufacturers to either improve the quality of their products or testing procedures, or disclose their inadequacies.

The agency would not have to be funded completely with taxes. Partial funding could be supplied through fines assessed against firms violating the mandatory disclosure requirements. The agency could also be given the right to sue on behalf of certain groups of defrauded purchasers. In certain class actions, for instance, when the potential recovery for each consumer is minimal, instead of undertaking the costly endeavor of distributing a few dollars to each consumer, the recovery could be used to help fund the agency.

Since most of the factors involved in this cost-benefit analysis cannot be easily quantified, it may be difficult to convince skeptics that it would be cost effective to establish such an agency. It would be unfortunate to conclude that because there has never been such an agency one should not be established now. In the securities area, we have an agency serving a similar purpose. The Securities and Exchange Commission, as one of its many functions, regulates a mandatory disclosure system.<sup>190</sup> Notwithstanding numerous criticisms of its operation and success, few have suggested its elimination. The Securities and Exchange Commission, on the contrary, has been credited with strengthening the market.<sup>191</sup> If a disclosure system can improve the securities market there is no reason why it cannot likewise improve the consumer products market. For purposes of mandatory disclosure, there is little difference between the sale of stock and the sale of a consumer product. Thousands of billions of dollars are spent annually on consumer products.<sup>192</sup> This is over twenty times the amount spent each year on the initial issue of securities under the Securities Act of 1933.<sup>193</sup> The difficulty of determining whether a consumer product should be purchased parallels that of determining whether a stock should be purchased. Yet,

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186. See Coffee, *supra* note 131, at 733; Landers & Rohner, *supra* note 19, at 714.

187. See Easterbrook & Fischel, *supra* note 16, at 677.

188. Easterbrook & Fischel, *supra* note 16, at 674; Landers & Rohner, *supra* note 19, at 741; Anderson, *supra* note 55, at 330, 334.

189. See Easterbrook & Fischel, *supra* note 16, at 674.

190. See generally Anderson, *supra* note 55.

191. See *id.* at 312-13.

192. Total personal consumption expenditures for 1985 reached \$10,401.9 billion. Of that total, \$5,057.5 billion was spent on durable (\$1,437 billion) and non-durable goods (\$3,620.5 billion). Finally, \$5,344.2 billion was spent on services. See COUNCIL OF ECONOMIC ADVISORS, ECONOMIC INDICATORS, OCTOBER 1986, REPORT TO THE JOINT ECONOMIC COMMITTEE, 99th Cong., 2d Sess. 4 (1986) [hereinafter ECONOMIC INDICATORS].

193. During the first three quarters of 1986, primary public securities offerings amounted to \$159.9 billion. This was an increase of \$73.2 billion over the same period in 1985. See SEC MONTHLY STATISTICAL REVIEW Vol. 45, No. 11, Nov. 1986, 5. For the same three quarters of 1986, \$3,938.5 billion was spent on durable and non-durable goods. See ECONOMIC INDICATORS, *supra* note 192.

substantive regulation of consumer products is probably even less viable than regulation of the sale of securities.<sup>194</sup> State corporate commissioners often determine whether prices charged for securities are fair.<sup>195</sup> Since securities are purchased for profit, it must be determined only whether the price offered is fair, considering the potential return offered by the company. Since consumer products are purchased for personal use, it is more difficult to determine the value of this use to consumers. Furthermore, a consumer agency would benefit a much larger segment of the public than does the Securities and Exchange Commission.

Disclosure systems do exist for certain types of consumer transactions. The most notable is the Truth in Lending Act.<sup>196</sup> The Truth in Lending Act has had only moderate success. There are two principal reasons for this. First, serious problems exist with the timing, methods, and types of its required disclosures.<sup>197</sup> Second, consumers do not possess the evaluative skills necessary to make use of the disclosed information.<sup>198</sup> As to the first objection, there is no reason why a new agency cannot learn from the mistakes made by the Truth in Lending Act. The second objection is far more serious.

Even with adequate information, the difficulty of understanding and evaluating information makes it hard for consumers to make rational choices. Notwithstanding these difficulties, mandatory disclosure would still greatly increase efficiency. Many consumers will be able to evaluate the information and make rational choices. This alone may be sufficient to cause prices to be competitive as well as to encourage the development of better products.<sup>199</sup> When a competitive price exists, consumers who do not have evaluative ability are also offered this lower price.<sup>200</sup> Furthermore, as the number of informed and educated consumers increases, the ability of con men, salesmen, and advertisers to convince buyers to purchase inferior, overpriced, or useless products will be greatly diminished.<sup>201</sup> It will be harder for them to locate these uninformed and uneducated consumers. A point may be reached where they will have to charge a price sufficiently high that even these uninformed and uneducated buyers will either be unable to afford or not desire to make the purchase. Second, most consumers could easily understand comparable price information. Third, consumer protection publications and groups could spend their time evaluating

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194. *Contra* Easterbrook & Fischel, *supra* note 16, at 681.

195. Many state corporate commissioners make substantive determinations as to the quality of an issue. *See* Brandt, *A Survey of Comments and a Ranking of States by Stringency Regulation*, 10 J. CORP. L. 689, 707-08 (1985). These states include: Texas, Wisconsin, California, Michigan, and Illinois. *Id.* at 709. These agencies use one of many ways for determining a fair market price for new, untested issues including: (1) looking at comparable firms already in the public market; (2) basing price on an allowable dilution of the interests of the new investors taking into consideration the price paid by promoters and insiders; or (3) looking at the firm's history of prior earnings and employing a price-earnings ratio technique. *Id.* at 697-98.

196. The original Act is subchapter 1 of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1667 (1976). In 1980, it was amended by the Truth in Lending Simplification and Reform Act, 15 U.S.C. §§ 1602-1607, 1610, 1612-1614, 1631-1632, 1635, 1637-1638, 1640-1641, 1663-1664, 1665a, 1666, 1666d, 1667d, 1691f (1980). *See generally* Landers & Rohner, *supra* note 19.

197. *See* Landers & Rohner, *supra* note 19, at 711-12.

198. *See* Brandt & Day, *supra* note 34, at 302-08.

199. *See* Schwartz & Wilde, *supra* note 3, at 637-38.

200. *Id.*

201. *See* Eisenberg, *supra* note 1, at 782-83.

rather than discovering relevant information.<sup>202</sup> Fourth, the required disclosures, if not adequate to allow most consumers to make rational choices, at least may be a red flag to them that the offered deal is suspect.<sup>203</sup> Disclosures may thereby limit the number of consumer mistakes. Finally, required disclosures are likely to prevent many inferior products from even entering the market. Thus many consumers will benefit even if they lack evaluative ability.

The lack of ability of most consumers to use disclosed information may still pose a serious problem. Although not likely to be completely successful, it may be worthwhile to attempt to educate consumers about shopping and bargaining skills.<sup>204</sup> For instance, high schools and adult education programs could offer classes in consumer protection. These classes could expose consumers to the common types of sales tactics, teach consumers the types of questions to ask, how to interpret answers, what information to acquire before making a purchase, where to obtain information, and how to invoke available remedies when a bad bargain has been made.

Even after all of these efforts, some very limited supplemental substantive regulation may be necessary to discourage merchants from taking advantage of the many consumers who are still unable to benefit from the disclosures.

## 2. Types and Forms of Mandatory Disclosure

In determining the scope of mandatory disclosure, the agency will have to make several decisions. First, it must be decided which products require disclosures. As with the exemptions under the Securities Act,<sup>205</sup> disclosure will not be cost effective for all products. There may be products for which the costs of mandatory disclosure would price them out of the market. In other situations, the market may already possess sufficient information.<sup>206</sup> For instance, disclosure may be unnecessary where a casual inspection by the consumer can determine product quality.<sup>207</sup> On the other hand, disclosure would be necessary when a product is infrequently purchased or when its quality can be determined only through extensive use.<sup>208</sup>

Second, the agency must decide what disclosures should be required. Even when the agency finds disclosure necessary, it may choose to require a different quantum or type of disclosure for different products. As to some products, only comparable price information may need to be disclosed. As to other products, disclosure of product quality or wholesale cost information may be necessary.

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202. See Anderson, *supra* note 55, at 313, 350; Coffee, *supra* note 131, at 723-29.

203. See Anderson, *supra* note 55, at 352.

204. See Brandt & Day, *supra* note 34, at 308; Comment, *supra* note 3, at 1169; Speidel, *supra* note 4, at 364.

205. While the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982), requires extensive disclosures, the Act does provide a number of exemptions. These exemptions are provided in situations in which it appears that the costs of disclosure would outweigh the benefits: Private Offerings: §§ 4(2) (codified at 15 U.S.C. § 77d(2) (1982)), and 4(6) (codified at 15 U.S.C. § 77d(6) (1982)); Limited Offerings: § 3(b) (codified at 15 U.S.C. § 77c(b) (1982)), Regulations A (codified at 17 C.F.R. §§ 230.251-230.262 (1986)), and D (codified at 17 C.F.R. §§ 230.501-230.506 (1986)); and Intrastate Offerings: § 3(a)(11) (codified at 15 U.S.C. § 77c(a)(11) (1982)), and Rule 147 (codified at 17 C.F.R. § 230.147 (1986)).

206. See Schwartz & Wilde, *supra* note 3, at 645, 656.

207. *Id.* at 659; R. POSNER, *supra* note 40, at 83.

208. See Schwartz & Wilde, *supra* note 3, at 662; R. POSNER, *supra* note 40, at 83.



Comparable price information would seem to be necessary for almost all products.<sup>209</sup> Yet, requiring disclosure of comparable price information is somewhat problematic.<sup>210</sup> To be useful, the prices of virtually all merchants must be listed. The mechanism for such disclosure has been questioned.<sup>211</sup> A threshold question arises: who will have the burden of compiling the information? Certainly, it would be inefficient to require each merchant to compile a list of his own. How often will the list be updated? Is a merchant bound by the listed price and if so, for how long? It has been argued that if the merchant cannot charge more than the list price, he may be tempted to overstate his price in order to protect against a rise in costs.<sup>212</sup> Most of these anticipated difficulties are more illusory than real. A merchant will want to quote as low a price as possible to induce consumers to shop at his store. To reduce the risk of the merchant charging more than the list price, he can be bound by the list price for a short period of time following the price quotation.

In determining what information should be disclosed, in what manner and at what time, the agency should learn from experiences under the Truth in Lending Act and the Securities Act.<sup>213</sup> There have been several problems with the Truth in Lending Act disclosure requirements.<sup>214</sup> First, too much information is required to be disclosed under the Act,<sup>215</sup> creating a cognitive overload. Second, the information required to be disclosed has not always been what a consumer needs to make his decision.<sup>216</sup> Much relevant information is not required to be disclosed at all. Third, the terminology the Act requires to be used is unfamiliar to most consumers. Fourth, some of the pertinent disclosures themselves are misleading.<sup>217</sup> Finally, most of the disclosures are required to be made only after the consumer has either psychologically made his purchase decision or has done as much shopping as he intends to do.<sup>218</sup>

Learning from these experiences, there are several principles the new agency should keep in mind. Disclosures should be simple and uncluttered.<sup>219</sup> They should be standardized so that easy comparisons are possible.<sup>220</sup> Inclusion of unnecessary language, boilerplate, or disclaimers should be avoided.<sup>221</sup> The agency must decide for whom the particular disclosures are intended. Since some products will be beyond the ability of consumers to understand, they will need to rely upon the opinions of experts. Some disclosures therefore should be included to permit an expert to determine whether a product is worthwhile.<sup>222</sup> Other disclosures should be under-

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209. See Comment, *supra* note 3, at 1176, 1182.

210. See Schwartz & Wilde, *supra* note 3, at 673-77.

211. See Comment, *supra* note 3, at 1183.

212. See Schwartz & Wilde, *supra* note 3, at 674-75.

213. See generally Anderson, *supra* note 55.

214. See generally Landers & Rohner, *supra* note 19.

215. See Landers & Rohner, *supra* note 19, at 721-22.

216. *Id.*

217. *Id.* at 722.

218. *Id.* at 715, 721.

219. *Id.* at 738; Anderson, *supra* note 55, at 325.

220. See Landers & Rohner, *supra* note 19, at 728-29, 738; Easterbrook & Fischel, *supra* note 16, at 700.

221. See Anderson, *supra* note 55, at 312.

222. *Id.*

standable to an ordinary consumer.<sup>223</sup> It may prove useful to provide a separate summary for consumers and a more detailed analysis for experts.<sup>224</sup> A summary may protect a consumer from purchasing a product that is clearly unfit for his needs.<sup>225</sup> The amount of information required to be disclosed initially should be fairly limited, yet more complete information should be available upon request.

The key to effective disclosure will be its timing and manner. Particular rules must differ depending upon the type of product. Yet certain guidelines are possible. It is clear from experience under the Truth in Lending Act and the Securities Act that the disclosures must take place before the consumer has made a psychological decision to purchase the product.<sup>226</sup> It would also be helpful if the disclosures were available without the consumer having to go to the store. Once he is at a store, the extent of potential savings may make it uneconomical for him to travel to another store. Merchants should be required to provide price information over the telephone so consumers need not incur the costs of visiting a store simply to obtain a price quotation.<sup>227</sup> Advertising should also be required to disclose certain information. Finally, there should be books compiled by the agency containing information about commonly purchased types of products.

The agency must also decide whether the retailer or manufacturer should make the disclosures. This will depend upon who can make the particular disclosure at the lowest cost. While the manufacturer will usually be in a better position to disclose product quality information, the merchant will be in the best position to furnish comparable price information.

### *B. Supplemental Remedies*

Experience under the Truth in Lending Act has shown that disclosure alone will not prevent consumers from making irrational purchases.<sup>228</sup> Consumers too often lack the ability to understand and use the information furnished.<sup>229</sup> To prevent merchants from taking advantage of this potentially large group of consumers, some substantive regulation may still be necessary.<sup>230</sup> It will be necessary to devise a remedy which will not discourage legitimate sales activities and yet will adequately protect consumers.

#### *1. Remedies When Adequate Information Is Disclosed*

When the consumer has been fully informed but makes what appears to be an irrational choice, it may be difficult to determine whether the merchant has taken advantage of the consumer's evaluative deficiencies or whether the individual's value

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223. *Id.*

224. *See id.* at 351-52.

225. *Id.*

226. *Id.* at 325.

227. *See* Landers & Rohner, *supra* note 19, at 715.

228. *Id.* at 722; Brandt & Day, *supra* note 34, at 308.

229. *See* Landers & Rohner, *supra* note 19, at 715, 722; Brandt & Day, *supra* note 34, at 308.

230. *See* Speidel, *supra* note 4, at 374.

preferences are simply different from those of most other consumers. For instance, his decision to shop at a nearby more expensive store could result from his dislike of driving. Likewise, his decision to purchase a product that others would regard as inferior may only evidence personal preferences. Distinguishing an idiosyncratic purchase decision from an irrational purchase would be extremely difficult. In addition, merchants who are not attempting to take advantage of consumers would be placed in the precarious position of never knowing when a seemingly legitimate sale would be set aside.

As a result, when there has been full disclosure, remedies should be directed solely at the prevention of egregious behavior. In the interest of economic efficiency, it may be necessary to leave unremedied certain borderline cases in which merchants may be taking advantage of consumers. Therefore, a consumer should be given the right to rescind only if he can show that the merchant exerted undue influence upon him.<sup>231</sup> The right to rescind may be the only way to discourage exploitation of consumers in the sale of certain types of products. The marketing of many diets, hair replacement lotions, dance lessons, modeling lessons, and vitamins involves a salesman exploiting a person's dreams and insecurities. Even if he gives the consumer accurate information, many salesmen will be able to use psychological pressure to convince the consumer to pay a high price for a very small chance of success. Other types of products are successfully sold because the consumer is given an inadequate opportunity to comprehend the information provided. An example is a homeowner who purchases a water purifier to go with his ice maker because the installer, upon arrival at the house, tells the consumer that unless he gets the water purifier installed at this time, the installer must make another home visit and charge the consumer for it. Similarly, car dealers often, after an oral agreement is reached on the price of the car and while the papers are being drawn up, try to sell the consumer an extended warranty, a security system, or rust proofing. In these situations, unless the information is furnished at the time of the original agreement, the consumer is deprived of the opportunity to adequately reflect on his decision. He should, as a result, have the right to rescind.

The agency should have the right to suspend the license of, or fine, any merchant who, as a common practice, knowingly takes advantage of consumers' disabilities. This may not discourage much of the questionable conduct, but when there has been full disclosure, it is not clear that a stronger remedy would be cost-effective.

## *2. Remedies When No Disclosure or When Disclosure Is Misleading*

When the merchant fails to make the required disclosures or when the information disclosed is inaccurate or misleading, remedies should be available to the agency and, to a limited extent, to the injured consumer. The agency should have the power to fine any merchant or manufacturer who fails to properly disclose

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231. This should require a showing similar to the present requirements for procedural unconscionability. *See supra* notes 6-12.

required information. If the failure is intentional, criminal sanctions as well as civil penalties should also be available.

When the disclosed information is inaccurate, a consumer already has a common law remedy for misrepresentation. When presently unavailable, it may be helpful to provide statutory liability for negligent misrepresentation.<sup>232</sup> The more difficult issue is what remedies should be available to the consumer when there has been a failure to disclose. We have already seen the difficulty of determining a product's value or market price. Neither of these standards is adequate to measure the merchant's recovery. A third measure may be appropriate.<sup>233</sup> When the merchant has failed to disclose comparable price information, a consumer could be permitted to raise the defense that he could have purchased the product at a lower price elsewhere. The merchant could then prove and recover his reasonable additional costs of doing business, but nothing more.

When the merchant has failed to disclose information as to quality, it may not be feasible to allow consumers a defense. If allowed, a court could try to determine how much the consumer would have paid for the product had the information been disclosed. This is probably unworkable. Yet, it may be feasible to give the consumer a right to rescind whenever he can convince the court that he would not have purchased the product if he had been given the information. Other than the right of rescission, the agency may be in the best position to enforce necessary compliance through injunctive or criminal proceedings.

In order to discourage frivolous lawsuits and defenses, it may be desirable to have some provision for taxing attorney's fees to the losing party.<sup>234</sup> Some problems may be encountered, especially with marginally solvent consumers, if the losing party were required to pay the prevailing party's attorney's fees. In order to ensure that the prevailing party will be compensated for his attorney's fees, it would be necessary to require each party to post a bond guaranteeing payment. Although some consumers will be unable to post the bond, it would be unfair to deny them the right to bring or defend the action. When a party is financially unable to post a bond, a procedure could be set up wherein a preliminary hearing is held to determine whether the liability of each party for the other's attorney's fees should be waived. At this hearing, the party would have to prove that, not only can he not afford to pay the other party's attorney's fees in the event of his loss, but that his claim has a good chance of success.

It may be necessary to distinguish between executory and completed transactions. When the consumer has yet to pay for the product, the merchant is likely to sue

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232. The common law remedy for negligent misrepresentation limits the negligent party to liability for the pecuniary losses of the misled party. RESTATEMENT (SECOND) OF TORTS § 552 (1977). Statutory provisions may be the best method of expanding this narrowly interpreted rule. See *id.* at comment a.

233. See *supra* notes 171-72 and accompanying text.

234. See R. POSNER, *supra* note 40, at 272, 450-53. Most consumer protection statutes presently provide for attorneys' fees to consumers. For example, the Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (1975); the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d) (1975); and the Hobby Protection Act, 15 U.S.C. § 2102 (1973) all allow the court to determine whether or not fees are recoverable. *Postow v. Oriental Bldg. Ass'n*, 455 F. Supp. 781 (D.D.C. 1978), *aff'd in part, rev'd in part sub nom. Postow v. OBA Fed. Sav. and Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980) upheld the constitutionality of mandatory attorneys' fee provisions.

him to recover the price. As a result, little additional litigation would result from allowing consumers to raise the failure to disclose as a defense. When, however, the consumer has already paid for the product, allowing him a right to recover the excess payment would result in additional lawsuits. There may be a flood of suits seeking to recover very small amounts of money. In addition, a merchant would find planning difficult if he could not rely upon the finality of his sales. On the other hand, refusing recovery would result in merchants mainly selling for cash. It would also create a hard-to-justify distinction between consumers who have already paid for a product and those who have not. More importantly, since a great percentage of consumer sales are for cash, limiting the rules to executory contracts would greatly reduce the rule's effectiveness. It may be possible to solve many of these problems by having a short, *e.g.*, three month statute of limitations period along with the taxing of attorney's fees to the losing party. Here, though, it may be best to deny individual consumers a remedy<sup>235</sup> and leave to the agency the task of enforcing compliance. The agency may even be given the power to sue on behalf of all consumers in the case of executed transactions.

## VI. CONCLUSION

A free market economy has many virtues in theory. Since demand determines price, only products desired by the consuming public will continue to be produced. Unwanted products will not sell and their manufacture will be discontinued. As a result, resources will seldom be wasted on manufacturing products not wanted by the public. If products are sold at comparable prices, the best available product will be purchased, thus encouraging its production. Inferior products will only be purchased if they are sold at lower prices.

The irrefutable logic of our free market economy is premised, though, on one very refutable assumption: that consumers know what they desire and are able to choose the product that best satisfies those desires. Unfortunately, there are two problems with this assumption. First, the market does not supply sufficient information to allow consumers to know whether a particular product will satisfy their wants. Second, many consumers do not have the analytical ability to make a rational choice. As a consequence, advertising and salesmanship have been successful in convincing consumers to purchase inferior, useless, and overpriced products. The result is that substantial resources are wasted on the advertising, sale, and manufacture of these products. Enforcing consumer promises simply encourages these wasteful activities. In order to improve our economy, as well as to protect consumers, it is necessary to require the disclosure of sufficient information thus enabling consumers to make rational purchases. We must also find ways to help consumers use information to make rational decisions. Since it may be difficult to teach consumers to be rational, it may be necessary instead to encourage merchants to refrain from taking advantage of irrational consumers. Being too large a task for the courts, it

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235. See Atiyah, *supra* note 1, at 526.

would be desirable to establish an agency for consumer transactions. This agency would be charged not only with the task of administering a mandatory disclosure system, but with the general policing of consumer/merchant transactions. The costs of establishing and operating such an agency would more than be offset by our increased economic efficiency.